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Supreme Court of the United States

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,
Petitioner,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER

No. 328

THE UNITED STATES,
Petitioner,

vs.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

RESPONDENT'S ANSWER BRIEF

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BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Claims together with its special findings of fact and conclusion of law are in the printed record beginning at page 30. The opinion is not yet officially reported.

—o—

JURISDICTION

The jurisdiction of the Court is invoked under Section 3 (b) of the Act of February 13, 1925; Title 28, Section 288, Subsection (b) U. S. Code Annotated.

Jurisdiction is also invoked under the provisions of the Jurisdictional Act under which this suit was brought, printed in full in the Amended Petition (R. 1-3), which Act provides:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, * * *."

The case was decided December 2, 1935 (R. 30). Motions for new trial were overruled in a Memorandum and Order June 1, 1936 (R. 98).

STATEMENT OF THE CASE

The Shoshone Indians have ever been friendly to the citizens and loyal to the Government of the United States (Finding 4, R. 36). They have been deprived of the use of, and finally of the title to, an undivided half of their Treaty Reservation, unlawfully and without compensation. The findings and opinion of the Court of Claims recognize and establish the wrong done the Shoshones. But it is believed that the legal conclusions drawn by the Court from the facts found have resulted in an entirely inadequate award of compensation.

Prior to 1868 the Shoshone Tribe held under Treaty (18 Stat. 685, 2 Kappler, 848), 44,672,000 acres of land in Colorado, Utah, Idaho and Wyoming. Their title was not disputed (Finding 1, R. 31).

Upon the close of the Civil War the transcontinental railroads, authorized by act of Congress, were in course of construction from the Missouri River westward to the Pacific. They were obliged to cross vast tracts in possession of Indian tribes, one of such tracts being the above-mentioned Shoshone Treaty lands. To meet this situation Congress enacted the Indian Peace Commission Act of July 20, 1867 (15 Stat. 17). It was necessary under the land-grant to the Union Pacific Railroad to clear title to a strip of land through the heart of the Shoshone domain 40 miles wide and over 400 miles long. The Peace Commission met with the Shoshones at Fort

Bridger. By the Treaty of July 3, 1868 (15 Stat. 673, 2 Kappler, 1020), upon which this suit is based, the Shoshones relinquished the vast domain theretofore held by them and accepted in lieu thereof the reservation involved in this cause. The reservation contained originally 3,054,182 acres and comprises the fairest and best watered portion of the State of Wyoming (Finding 5, R. 38). The Treaty contains the following provisions (Finding 2, pp. 33, 36):

> "ARTICLE 2. * * * The United States further agrees that the following districts of country, to wit: * * * (describing boundaries) * * * shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid."

(NOTE.—This language did not include the Arapahoe Indians.)

> "ARTICLE 11. No treaty for the cession of any portion of the reservation herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all adult male Indians occupying or interested in the same; * * *

Provisions substantially identical with the foregoing appear in all of the great treaties made by the Indian Peace Commission (Opinion., R. 70).

The Shoshone Tribe promptly thereafter located upon this reservation and has ever since remained thereon and kept and observed all of the provisions of said treaty (Finding 6, R. 40).

In the winter of 1877-1878, the Northern Arapahoe Indians, who had been at war with the Government of the United States, were brought from western Nebraska, under military escort, to and upon the Shoshone Reservation under the promise of the Indian Office officials that they would be removed therefrom the following year and located upon a reservation of their own at a place in Wyoming called Red Buttes near the mouth of the Sweetwater River (Finding 10, R. 43). They were never removed (Finding 10, R. 50). The Shoshones, from time to time, protested vigorously and appropriately against the presence of the intruders on their reservation and demanded their removal (Finding 10, R. 50). Their protests were ignored by officials of the Indian Office, and on August 13, 1891, the Commissioner of Indian Affairs, in writing, advised that (Finding 11, R. 50):

> "This office holds * * * that the Arapahoes have equal rights to the land on said reservation which does not depend upon the further consent of the Shoshones, * * *"

The above was the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe band of Indians upon the Shoshone Reservation (Finding 11, R. 50). Thereafter the Shoshones continued

their protests against the presence of the Arapahoes on the reservation and have continued to protest down to the present date (Finding 10, R. 45, 48, 49, 50; Finding 11, R. 50; Findings 14-15, R. 53; Opin., R. 73).

The Jurisdictional Act of March 3, 1927 (44 Stat. 1349), printed in full in the Amended Petition (R. 1-3), conferred jurisdiction upon the Court of Claims, with right of appeal to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe may have against the United States arising under or growing out of the Treaty of July 3, 1868, or any subsequent agreement or act of Congress affecting said tribe. The Act further provided:

> "In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands or other property."

This is the only act ever passed by Congress pertaining to taking of title to the lands in suit (Finding 11, R. 51).

Pursuant to this Statute the Shoshones brought the present suit to recover just compensation for the taking of the temporary use and occupancy of an undivided half of their reservation by the United States for the use of the Arapahoes, and to recover just compensation for the permanent taking of the title to an undivided half interest in said reservation by the United States for the benefit of itself and the Arapahoe Tribe.

The Court of Claims held that the matter of permanent location of the Arapahoes upon the Shoshone Reservation had never been presented to the Shoshones (Finding 10, R. 48); that the Shoshones had never consented to the permanent location of the Arapahoes upon the Shoshone Reservation (Finding 10, R. 45); that there had been a use and a taking of an undivided half interest in the Shoshone's Reservation by the United States and that the permanent taking was effectuated by the 1891 letter of the Commissioner of Indian Affairs (Finding 11, R. 50; Opin., R. 78). The Court allowed the Shoshones at the rate of $1.75 per acre for an undivided half interest in the 2,343,540 acres comprising the reservation in 1891, amounting to $2,050,597.50 (Finding 16, R. 53; Opin., 78-79). The Court also allowed for the use and occupancy of said undivided half from 1878 to 1891, by approximately 1,000 Arapahoe Indians, at the rate of $25.00 per Indian per year, amounting to $332,475 (Finding 16, R. 53); Opin., R. 82). The Court made other minor allowances making the total which it found the plaintiff entitled to recover, $2,483,467.99 (R. 68).

Against the above recovery the Court awarded the United States on its counterclaim for gratuities, $1,689,646.50 (R. 68).

The Court adjudged that the plaintiff recover from the United States the difference between the above amounts, viz., $793,821.49 (R. 68).

SUMMARY OF QUESTIONS PRESENTED

1. The Court of Claims held that the letter of the Commissioner of Indian Affairs of August 13, 1891, constituted a permanent taking of an undivided half interest in the Shoshone's Treaty Reservation. Petitioner contends that an interest in the Shoshone's Reservation could be acquired only:

   1. In the manner provided by Article 11 of the Treaty, viz., by signature of a majority of the adult males; or

   2. As provided in Section 2116, R. S.

2. Petitioner submits that the compensation allowed by the Court of Claims for temporary use and occupation of an undivided half interest in the Shoshone Treaty Reservation from 1878 until the permanent taking of said undivided half interest, viz., $25,000 per year is, as a matter of law, inadequate. The Court found the value of the undivided half interest in 1891 to be a little over $2,050,000. A return of 4% per annum on this amount would be $82,000 per year, which is the minimum to which, in view of the Court's findings as to the desirability of the Shoshone Reservation as a place for the Government to keep the Arapahoes, the Shoshones should be entitled. The Court of Claims allowed nothing by way of addition to the value of the use taken, at the time of taking, to produce the present full equivalent of that value paid contemporaneously. Just compensation for taking use of property is not rendered by paying, many years after the use, merely the value of the use at the time of taking.

3. The Jurisdictional Act provides that the judgment shall extinguish the title of the Shoshones to the property

taken. This is the first and only declaration by Congress, or by any one authorized to represent the United States, of an intent to take permanently an interest in the Shoshone's Reservation. Petitioner contends that the taking of the title to an undivided half interest in their Treaty Reservation occurred upon the passage of the Jurisdictional Act of 1927 and the bringing of this suit thereunder and that the value should be fixed as of 1927, together with interest thereon from that date as a part of just compensation.

4. However, should this Court conclude that the permanent taking of the undivided half of the reservation was accomplished by the Commissioner's letter of 1891, then, and in that event, there should be added to the value so found such sum as will produce the present full equivalent of that value paid contemporaneously. Interest at a reasonable rate is a proper and convenient method of ascertaining the amount to be added.

The Order of the Court of Claims of June 1, 1936, overruling the motions for new trial, both of petitioner and of the United States, states (R. 99):

> "If, under all of the facts and circumstances as disclosed by the record and the history of this case from 1878, when the Arapahoes were brought to and placed upon the Shoshone Reservation over the objection of plaintiff, any wrong or injustice has been done in the disposition that the court has made of the matter, it was against the plaintiff in the conclusion that the Shoshone property was actually and legally taken in 1891 instead of 1927, in the value given to the Shoshones for the property taken from them, and in not allowing interest as a part of the measure of compensation.
> * * *
>
> "If the court had been dealing with similar questions between private parties or between the Govern-

ment and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

———o———

SPECIFICATION OF ERRORS

I.

The Court erred in holding as a matter of law, in substance and effect, that an undivided half interest in the Shoshone's Treaty Reservation was permanently taken from the Shoshone Tribe by the United States on August 13, 1891, by virtue of the letter and holding of the Commissioner of Indian Affairs of said date, in which the Commissioner stated (Finding 11, R. 50; Opin., R. 78):

> "This office holds * * * that the Arapahoes have equal rights to the land on said Reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding."

Authorities.

Article 11 Shoshone Treaty, July 3, 1868, 15 Stat. 675;
Revised Statutes U. S. Sec. 2116; 25 U. S. C. A. Sec. 117;
Lane, Secretary of Interior v. Pueblo of Santa Rosa, 249 U. S. 110, 113;
Borax Consolidated v. Los Angeles, 296 U. S. 10;
Leecy v. United States, C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed, 232 U. S. 731;
United States v. Creek Nation, 295 U. S. 103;
Pueblo of Santa Rosa v. Fall, 273 U. S. 315, 320-1;
18 *Opinions Attorney General,* 235;
United States v. Carpenter, 111 U. S. 347;
Leavenworth, et al. R. R. Co. v. United States, 92 U. S. 733.

II.

The Court erred as a matter of law in not holding that the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act herein and the filing of this suit by the Shoshone Tribe under said Act.

Same authorities as Number I.

III.

The Court erred in holding, as a matter of law, that the statute, 25 U. S. Code Annotated, Indians, Sec. 2, charging the Commissioner of Indian Affairs with the duty to manage all Indian Affairs, conferred power on said Commissioner to hold that the Arapahoes had equal rights to the land of the Shoshone's Treaty Reservation (Opin., R. 76-78); the duty to manage not being equivalent to authority to alienate the corpus of the Shoshone's property.

Same authorities as Number I.

IV.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Commissioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power on such Commissioner to alienate any interest in the Shoshone's Treaty lands in violation of the express provision of a later statute (R. S., Sec. 2116; Sec. 177, Title 25, U. S. C. A.) reading as follows:

"SEC. 177. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Same authorities as Number I.

V.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Commissioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power upon said Commissioner to violate and nullify Article Eleven of the Shoshone's 1868 Treaty, reading as follows:

"ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same;"

Same authorities as Number 1.

VI.

The Court erred in holding as a matter of law, in substance and effect, that the Commissioner of Indian Affairs had the right and power to determine that the Arapahoes had any rights to the land embraced within the Shoshone Treaty Reservation, in violation of the statutes of the United States relating to disposal of any interest in Indian Tribal Lands, under the findings of the Court of Claims that the Shoshone Tribe never consented to admit the

Arapahoes amongst them on said Reservation as permanent occupants and that no legal consent, agreement, or contract, had ever been entered into between the Shoshone Tribe and the Arapahoe Tribe or the United States whereby the Shoshones surrendered any rights in and to said Reservation to the Arapahoes (Finding 10, R. 45, 48; Opin., R. 70).

Same authorities as Number I.

VII.

The Court erred as a matter of law, in allowing the Shoshones compensation, wholly inadequate, for the temporary use and occupancy of the Reservation by the Arapahoes equally with the Shoshones and for the benefit and profit of the United States (Opin., R. 80-81), for only the period 1878 to 1891; the Court should have allowed the Shoshones compensation based on commercial value and profit to the United States and to the Arapahoes for such temporary use and occupancy for the additional period 1891 to 1927, together with such additions thereto as may be required to produce the present full equivalent of such compensation paid contemporaneously with said temporary use and occupancy. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been added (Finding 16, R. 53).

Authorities.

Johnson v. United States, 2 Ct. Cl. 391;
Johnson v. United States, 4 Ct. Cl. 248;
Pope v. United States, 26 Ct. Cl. 11;
Waite v. United States, 282 U. S. 508;
Phelps v. United States, 274 U. S. 341;

Jacobs v. United States, 290 U. S. 13;
Tiaco v. Forbes, 228 U. S. 549;
United States v. Steamer Nuestra Senora De Regla, 108 U. S. 92;
Dona Maria Francisca O'Reilly de Camara v. Brooke, 209 U. S. 45.

VIII.

The Court erred in holding as a matter of law, in substance and effect, that the only effect of the Jurisdictional Act was to ratify a permanent taking in 1891 of an undivided half interest in the Shoshone Treaty Reservation (Opin., R. 77-78), when in law said Act, First, permitted the recovery of damages, if any, for the temporary use of an undivided half of said Reservation from 1878 to 1927 as under an implied lease; and, Second, provided that the decree of the Court should permanently take and cancel the Shoshone's treaty title to the Arapahoe allotments and to an undivided half interest in the unallotted tribal lands, both provisions necessarily implying the constitutional right to just compensation.

Authorities.

Johnson v. United States, 2 Ct. Cl. 391;
Johnson v. United States, 4 Ct. Cl. 248;
Pope v. United States, 26 Ct. Cl. 11;
International Paper Co. v. United States, 282 U. S. 399;
Crozier v. Fried-Krupp, 224 U. S. 290.

IX.

The Court erred as a matter of law in failing to allow the Shoshones the just compensation required by the Fifth Amendment of the Constitution of the United States for the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of

the Shoshone Treaty Reservation, whether same occurred in 1891 or in 1927, in that the Court should have included in the judgment such addition to the value thereof at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously with the permanent taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been added.

Authorities.

United States v. Creek Nation, 295 U. S. 103;
Jacobs v. United States, 290 U. S. 13;
Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306;
Phelps v. United States, 274 U. S. 341;
Waite v. United States, 282 U. S. 508;
Yankton Sioux Tribe of Indians v. United States, 272 U. S. 351, 65 Ct. Cls. 428.

SUMMARY OF ARGUMENT

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation for the use of the United States and the Arapahoe Tribe, or to destroy the corpus of the trust estate rather than administer the same.

2. The compensation allowed for the temporary use and occupation of the Shoshone's Reservation is inadequate, both as to time allowed for and amount thereof.

3. The permanent taking of an undivided half interest in the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act and the bringing of this suit thereunder, and not otherwise.

4. Just compensation requires that the Shoshones be awarded such sum, in addition to the value of the use, at the time of such use, and in addition to the value of the land at the time of annulling and cancelling the title, as will produce the present full equivalent of those values paid contemporaneously. Interest at a reasonable rate is a proper and convenient method to ascertain the amount to be added.

—o—

ARGUMENT

Assignments of Error I to VI.

The first six assignments of error relate to the legal significance and effect attributed by the Court of Claims in its decision herein, to the letter and holding of the Commissioner of Indian Affairs of August 13, 1891, and to the manner in which Indian titles may be taken. Therefore, these six assignments of error will be considered together:

Following is a pertinent extract from the Special Findings of Fact (Finding 11, R. 50-51):

> "No definite action was ever taken by the officials of the Government with reference to the permanent settlement of the Arapahoes until August 13, 1891. Shortly prior to that date a commission, known as the 'Woodruff Commission,' had been sent to the Shoshone Reservation to negotiate for a cession of such portion of the Reservation as the Indians chose to dispose of. On August 5, 1891, the chairman of the Commission wrote the Commissioner of Indian Affairs asking for instructions as to how the Commission should treat with the Indians, inasmuch as Chief Washakie, and the Shoshones denied that the Arapahoes had any rights to or upon the reservation. He stated that the Shoshones insisted that the Arapahoes

came there merely as temporary visitors; that the claim of the Shoshones to the whole of the reservation was backed by Dr. James Irwin, who was present and discussed the matter of the presence of the Arapahoes with Chief Washakie and the Shoshones shortly before their arrival at the Shoshone Reservation in March, 1878. In reply the Commissioner of Indian Affairs, on August 13, advised the Commissioner that 'this office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding.' This is the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe Band of Indians upon the Shoshone Reservation. Notwithstanding the continued protests of the Shoshones, the Woodruff Commission proceeded to counsel alike with the Shoshone and the Arapahoe Indians. The result of these negotiations will be further referred to hereinafter. The ruling made by the Commissioner of Indian Affairs on August 13, 1891, has ever since been enforced by the Interior Department. No action, except the enactment of the Jurisdictional Act in this case, was ever taken by Congress with reference to the presence of the Arapahoe Indians upon the Shoshone Reservation."

The opinion states (R. 75-76):

"We are of opinion that the Government, through the Commissioner of Indian Affairs, who by statute was charged with the management of all Indian affairs and all matters arising out of Indian relations under direction of the Secretary of the Interior, and agreeable to such regulations as the President might prescribe, took from the plaintiff tribe an undivided one-half interest in all property and property rights to which they were entitled by law for the benefit of the Northern Arapahoe Indians; and that this action

of the Government, acting through the Commissioner of Indian Affairs, occurred on August 13, 1891, when that official definitely held that 'this office holds that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones' (Finding 11). Prior to that time—that is, from the period March 18, 1878, until August, 1891—the Arapahoes simply resided upon, used, and occupied the reservation equally with the Shoshones as a result of the errors and misunderstandings by the officials charged by law with the management of all Indian affairs as to the willingness and consent of the Shoshones to admit the Arapahoes amongst them, without any definite action having been taken in regard to the matter when the error was first called to the attention of the proper officials."

The opinion states (R. 78):

"For the reasons stated, it is our opinion that an undivided one-half interest in plaintiff's reservation was taken from them for the benefit of the Northern Band of Arapahoes on August 13, 1891, and that the plaintiff tribe is entitled to recover the value of an undivided one-half interest in the reservation on that date."

Petitioner respectfully submits that the Commissioner of Indian Affairs was without authority to divest the Shoshones of lands and rights in the reservation held by them under their Treaty of 1868. The opinion holds (R. 76-77), that by Sec. 2, U. S. Code Annotated, Title 25, the Commissioner of Indian Affairs, the official directly charged with the administration and management of all Indian affairs, is vested with authority and jurisdiction by writing a letter to take from the Shoshones their land and Treaty rights. It should be borne in mind that Sec. 2 of Title 25 giving the Commissioner of Indian Affairs

the management of all Indian affairs, was the act of July 9, 1832 (4 Stat. 564). In 1834 Congress enacted R. S., Sec. 2116; Sec. 177, 25 U. S. Code Annotated, as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

In 1868 the Shoshone Treaty was made and was later duly ratified and proclaimed and became supreme law of the land. It provided, with respect to the lands on the Shoshone Reservation (Finding 2, R. 36):

> "ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in same."

The Shoshone Treaty also provided, Art. 2, that any other tribes which the Shoshones might be willing to admit amongst them could only be admitted "with the consent of the United States" (Finding 2, R. 33). Such consent could be given only by Congress.

It is respectfully submitted that the power and jurisdiction attributed to the Commissioner of Indian Affairs in the Court's decision herein is without support in, and is contrary to, the authorities.

> *Leecy v. United States*, C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed on motion of Solicitor General, 232 U. S. 731.

Complainant, a Chippewa Indian, was entitled under Act of Congress to an allotment of land on the White

Earth reservation. She selected and applied for a certain 80 acre tract chiefly valuable for pine timber growing thereon. The United States Indian Agent on the reservation had set the land apart as a sawmill reserve for general reservation purposes and for lumber to build houses for the Indians. The agent's action was approved by the Secretary of the Interior. The court said:

> "There is only one question in this case, and that is: Did the Indian agent or the Secretary of the Interior have any rightful authority to withdraw the land in question from allotment for the purposes set up in the answer. * * *
>
> "Section 441, Revised Statutes (U. S. Comp. St. 1901, p. 252):
>
> "'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third—The Indians.'
>
> "Section 463, Revised Statutes (U. S. Comp. St. 1901, p. 262):
>
> "'The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.'
>
> "None of these provisions conferred the power claimed. * * *
>
> "Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be

executed under, not nullified by, rules and regulations."

"A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so."

United States v. Creek Nation, 295 U. S. 103.

"But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane v. Santa Rosa, 249 U. S. 110, 113; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 308."

* * *

Borax Consolidated v. City of Los Angeles, 296 U. S. 10.

" 'Of course,' said the Court in St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 641 26 L. Ed. 875, 876, 'when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer

them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed.' * * *

'Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers."

United States v. Carpenter, 111 U. S. 347.

"Syl. 1: Where land is reserved for the use of an Indian Tribe by treaty, it cannot be taken up, either by settlement or by location, under the Louisiana Agricultural College scrip."

"Syl. 2. The treaty is notice that the land will be retained by the Government for the use of the Indians, and this purpose cannot be defeated by the action of any officers of the land department."

Lane, Secretary of the Interior, v. Pueblo of Santa Rosa, 249 U. S. 110, 113.

"The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States,—recognized as such by the legislative and executive departments,—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendant in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States, and disposing of the same under the Public Land Laws. That would not be an exercise of guardianship, but an act of confisca-

tion. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership."

Pueblo of Santa Rosa v. Fall, 273 U. S. 315, 320-1.

In this case the Court held that a deed to lands belonging to an Indian village, executed by the captain of the village, was void because not executed as required by the Statute.

"Section 2116 declares that no 'conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. These sections apply here whether the Indians concerned are to be classified as nomadic or Pueblo Indians. United States v. Candelaria, 271 U. S. 432, 441, 442. None of their requirements can be dispensed with and it does not appear that in respect of most of them there was even an attempt to comply. See and compare, Green v. Menominee Tribe, 233 U. S. 558, 568; Lease of Indian Lands for Grazing Purposes, 18 Ops. Atty. Gen. 497. * * * "

18 *Opinions Attorney General,* 235-237 (Mr. Garland).

"'This statutory provision (R. S. 2116) is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not, therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of

> these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States. * * * '
>
> "'I submit that the power of the Department to authorize such leases to be made, or that of the President or Secretary to approve or to make the same, if it exists at all must rest upon some law, and therefore be derived from either a treaty or a statutory provision.'"

In 1896 Petitioner Indians ceded to the United States a tract of land in the northeast corner of the Reservation. Over the protest of the Shoshones the Arapahoes were permitted to participate in the council and to join in the cession agreement on condition that a provision protecting the Shoshone's treaty rights be inserted therein (Finding 14, R. 52). This agreement was ratified by Congress on June 7, 1897 (30 Stat. 62). Again in 1904 there was a cession of a portion of the Reservation and the representative of the United States met the same situation respecting the objections of the Shoshones to the presence of the Arapahoes and overcame same by inserting in the agreement a provision protecting the Shoshone's treaty rights. This agreement was approved by Congress March 3, 1905 (33 Stat. 1016) (Finding 15, R. 53).

From these findings by the Court it is manifest that Congress in 1897 and in 1905, by enacting the appropriate reservations in each of said agreements, adhered to and preserved for the Shoshones all benefits to which they were entitled under their 1868 treaty stipulations. These acts of Congress were, respectively, six and fourteen years subsequent to the Commissioner's letter of 1891. The 1891 letter did not deter Congress from honoring and adhering

to its solemn treaty stipulations and Congress continued so to do by the Jurisdictional Act of March 3, 1927, wherein it provided the manner and the method to acquire the title to an undivided half interest in the Shoshone's treaty reservation.

It is submitted that the foregoing authorities amply sustain the first six assignments of error. The "holding" of the Commissioner of Indian Affairs of August 13, 1891, was void and of no legal efficacy so far as concerned a permanent taking of any interest in the Shoshone Treaty Reservation lands. And that holding did not increase in legal power and efficacy with the passing years. It was just as void in 1927, when Congress enacted the Jurisdictional Act, providing for the cancellation of the Shoshone title by a suit under said act, as it was in 1891. The Act of 1927 and this suit thereunder passed the title.

Assignment of Error VII.

Accepting the authorities and law as to assignments of Error I to VI, viz., that there was no permanent taking until 1927, then it follows that assignment VII should be sustained, viz., compensation should be allowed for temporary use and occupancy from 1878 to 1927, instead of only from 1878 to 1891.

Johnson v. United States, 2 Ct. Cl. 391.

Syl. VI. "The rule for the measure of damages for the temporary occupation of lands by the government is the value of such temporary occupancy at the time of entry, as though the claimant had leased and the government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the government has the option of discontinuing the implied tenancy on any day or of con-

tinuing it indefinitely" (Cited with approval, 261 Fed. 690).

Johnson v. United States, 4 Ct. Cl. 248.

"Ejectment * * * does not lie against the Government. * * *

"But when, in an action in the nature of ejectment, the claimant's 'right of property' is established, the Government will be deemed to have entered as his tenant under an implied lease, whereof the 'just compensation' secured by the Constitution to those whose property is taken for the public use is the rent. * * *

"When the Government has entered upon land, and holds under an implied lease, the measure of the damages must be limited to the value of the occupancy, as though the claimant had leased and the Government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the Government holds the option of discontinuing the implied tenancy at any time or continuing it indefinitely."

See also *Pope v. United States,* 26 Ct. Cl. 11.

It is further submitted that under the findings of the Court the award for temporary use and occupation is inadequate. In finding 16, R. 53, the value in 1891 of the undivided half interest in the reservation used by the Arapahoes is fixed at $2,050,597.50. For the use of this property the Shoshones are awarded $25,575 annually, which is at the rate of about 1¼% per annum of the value of the property use. The current, legal interest rate in Wyoming has never been less than 7%. An interest rate of only 4% annually on $2,050,000 would give an annual return of $82,000. For only the thirteen years mentioned in the findings this amounts to $1,066,000 instead of $332,475.

The Court, Opin., R. 81-82, holds that the Shoshones are entitled to damages for use and occupation of their reservation by the Arapahoes and that a reasonable allowance

for such use and occupation is the sum of $25.00 per year for each Arapahoe. $25.00 per year per Indian is less than seven (7) cents a day for untrammeled use and occupation of over 2,000,000 acres of land, containing unlimited resources. Attention is especially directed to the vivid description of this beautiful country, the home of the Shoshones, appearing in the Court's finding 5, R. 38-40. A few excerpts therefrom follow:

> "The plaintiff's reservation, set apart by the treaty of July 3, 1868, is located in the central-western part of Wyoming. * * * The reservation is protected from the elements by these two ranges of mountains; also by the Beaver Divide to the south. The ancient Indian name for the reservation is Warm Valley.
>
> "The reservation comprises the fairest and best-watered portion of the State of Wyoming. The character of the land ranges from precipitous mountains at the extreme north and west, down through heavily timbered upland, lower down through well-grassed bench land, to a series of river valleys with level, deep soil toward the eastern portion of the reservation * * * numerous fresh-water lakes well stocked with trout and waterfowl, and on whose banks live beaver, otter and other fur-bearing animals. The mountains contain more than 400,000 acres of spruce, pinon, hemlock, balsam, and yellow and white pine timber. The river valleys are level, easily irrigated, several miles in width, and contain a warm, rich, and productive soil. Stock lives the year around without other feed than being herded on the grasses growing from the mountain tops to the lowest valleys in greatest abundance, affording ample feed and range for livestock in the mountains in the summer season, and in the lower reaches of the reservation in the fall and winter seasons. The water is pure and the climate is mild and regular. The soil is rich and compares favorably in fertility to that of Illinois and Iowa. * * *

"The soil and climatic conditions on the reservation are well suited for the production of alfalfa, sweet clover, hard and soft wheat, oats, barley, corn, beans, peas, tomatoes, sugar beets, garden vegetables, small fruits and melons. The land has a high average yield of crops.

"The reservation contained substantial deposits of coal, oil, gas, gypsum and minerals. * * *

"The land on the reservation best suited for agricultural purposes lies toward the eastern portion thereof where the river valleys are wider, the soil deeper, and free from boulders, easy to irrigate, and nearer a railroad, and due to elevation, the growing season is from three to four weeks longer in the eastern portion of the reservation than in the western portion. The Arapahoes were placed on the eastern portion of the reservation. * * * Ample water is available to irrigate all agricultural land on the reservation. The reservation is supplied with sufficient water power for the production of water, electric light and power.

"At the time of the execution of the treaty of July 3, 1868, buffalo, elk, bear, antelope, deer and other wild animals suitable for food, were in great abundance on the reservation. Such game was native and indigenous to the mountains and valleys of the reservation and was found sufficiently adequate for subsistence of the Indians for many years. The plaintiff tribe of Indians went on annual hunts into the mountains for food, and the skins of certain wild animals were used for robes and other necessary uses for members of the tribe."

In the opinion (R. 79), the Court stated:

"It (Reservation) contained a large but undetermined quantity of oil and gas. * * * The oil and gas reserves alone were of great value in 1891. The Government for the purpose of this suit, fixed the 1926 present value of these reserves at $6,000,000."

At R. 82, the Court further stated:

> "After they (Arapahoes) were placed upon the Shoshone Reservation in 1878, they used the same equally with the Shoshones by hunting, farming, pasturing their stock, building houses and fences, and sharing in the facilities of the agency and the employees provided by the Government for the Shoshone tribe" (Finding 10, R. 50).

From the Court's description above noted, it must be conceded that the Shoshone Reservation was a most desirable country in which to live. It is unbelievable that for the mere pittance of less than seven cents a day allowed by the Court an Arapahoe Indian could have obtained anywhere in the United States the right and privilege to live on and roam over a tract of country, embracing over 2,000,000 acres, so generally desirable as is described above; to hunt in the mountains and fish in the streams to his heart's content; farm the land; pasture horses and cattle; cut timber for fires, homes, fences, corrals and teepee poles; cut and sell wood and hay to a Government military post (Finding 18, R. 54); obtain oil and coal for light and heat; gather fruits, berries, nuts, herbs, and vegetables; procure all the buffalo meat he could eat and sell what he could not dispose of; use or sell the hides, skins, robes and horns; shoot all kinds of small game and share in the plentiful supply of antelope, deer, elk, bear, and other game animals and use the pelts, furs and skins for clothing and barter (Finding 5, R. 40). In short, all the wonderful resources of the Shoshone Reservation, affording an Indian subsistence, clothing, shelter and articles for barter, were at his daily disposal with little effort. There were ample resources of all kinds on the reservation—animal, vegetable, and mineral, as

well as materials for shelter, warmth and comfort,—to supply all the requirements of the Indian mode of life and in addition furnish numerous articles of barter which brought cash money.

The Commissioner of Indian Affairs in his Annual Report for 1866, page 118, estimated the needs of the Pyramid Reserve Indians for rations at 40 cents per day each; and in his report for 1869, page 246, he estimated the cost of subsistence of the Mescalero Apache Indians, consisting of full ration of beef and other necessaries, at approximately $60.00 a year per Indian.

The benefit accruing to the United States is an important element in fixing the value of the use and occupation. It largely benefited financially and otherwise by having placed the Arapahoes on the Shoshone Reservation. These Indians had proved a wily and rapacious tribe (Finding 8, R. 41-53; Opin., R. 82). Army officers protested against placing them on the Shoshone Reservation (Finding 10, R. 47). Had the Arapahoes not been placed on the Shoshone Reservation a separate reservation, promised them by treaty, would have been imperative which new reservation would have necessitated agency buildings, warehouses, mills, school houses, farmers, blacksmiths, teachers, physicians and other employes, and also additional appropriations for their support and maintenance (Finding 7, R. 41).

All the above items and the advantages accruing to the United States, it is submitted, should be taken into consideration in fixing a proper allowance for use and occupation. From a commercial standpoint it would have been impossible for a price of less than seven cents a day per

Indian to have obtained the large and varied consideration furnished by the Shoshones to the Arapahoes and the Government; consequently justice requires that an allowance be granted commensurate with the value obtained from the Shoshones and enjoyed by the Arapahoes and the Government.

The Arapahoes had the use of the whole reservation in common with the Shoshones (Finding 10, R. 50), together with all its varied and valuable resources, and in addition thereto the advantages of the administrative, educational, farming, and other facilities provided by the Shoshones (Opin., R. 82).

Present Full Equivalent Should Be Allowed

In addition to proper compensation for the temporary use and occupancy from 1878 to 1927, there should be allowed such further amount as may be required to produce the present full equivalent of such compensation paid contemporaneously.

Phelps v. United States, 274 U. S. 341.

This was a case involving the question of compensation for the use of a pier, the lease on which was owned by plaintiffs. The use of the pier was requisitioned by the Secretary of War in 1917. The Court of Claims allowed compensation for the use, but disallowed the claim for additional amounts claimed as part of just compensation. This court said:

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the pur-

pose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken."

In connection with the Phelps case it should be noted that the Secretary of War did not take the title to the pier, nor the title to an undivided half interest thereof. He took merely the *use* of the pier.

Waite v. United States, 282 U. S. 508.

This was a suit to recover for the unlicensed use of a patented invention. The opinion states:

"The statute grants 'recovery of his reasonable and entire compensation for such use.' We are of opinion that interest should be allowed in order to make the compensation 'entire.' In addition to the purpose of the word adverted to in Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 343, we cannot doubt that it was intended to accomplish complete justice as between the plaintiff and the United States."

Jacobs v. United States, 290 U. S. 13.

"The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right.* It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. Title 28, Sec. 41 (20). * * * (Italics ours.)

"The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that

> value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' ''

Petitioner respectfully emphasizes that taking the use of an undivided one-half of the Shoshone Reservation by executive officers and appropriating it to the benefit of the United States and to the unqualified benefit of the Arapahoes, was a taking for public use; and under the ratification by the jurisdictional act of 1927 the case stands as though the United States under its soverign power, from year to year, had taken the use of the property of the Shoshones.

Tiaco v. Forbes, 228 U. S. 549;
United States v. Steamer Nuestra Senora De Regla, 108 U. S. 92;
Dona Maria Francisca O'Reilly de Camara v. Brooke, 209 U. S. 45.

Assignment of Error VIII.

The language of the Jurisdictional Act is clear. It provides, Sec. 3 (R. 3):

> "In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property."

The foregoing contemplates two things. First, recovery for the damages, if any, for the temporary use of an undivided half of the Shoshones' reservation from 1878 to 1927. That use was an accomplished fact when the Jurisdictional Act was passed. Whether the Commissioner of Indian Affairs had the power and authority to temporar-

ily use the Shoshones' reservation as a home for the wandering Arapahoes, or whether he enforced such temporary use unlawfully, at any rate he had done that very thing. So the fact of the use stood accomplished and Congress authorized suit for damages therefor.

But Congress recognized that whatever claims the Commissioner may have asserted as to permanently taking a half interest in the lands of the reservation were without foundation. He had no such power. Congress also recognized that permanent provision must be made for the Arapahoes, otherwise there would be a constant recurrence of the Shoshones' claim for temporary use and occupation.

Therefore, Congress provided, second:

> * * * "the decree of the court shall * * * annul and cancel all claim, right, and title of the Shoshone Indians in and to such money, lands, or other property."

Unless Congress had recognized the distinction between damages for the temporary use, and compensation for the permanent taking, the words last above quoted are superfluous. Congress knew that nothing the Commissioner had done, or could do, could annul and cancel the Shoshones' Treaty title.

The Court of Claims, in rejecting plaintiff's contention above, states (Opin., R. 78):

> "In *Crozier v. Fried. Krupp Aktiengesellschaft,* 224 U. S. 290, it was held that 'The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.' In that

> case the court was construing the act of 1910 authorizing suits against the United States for patent infringement, and the issue involved a patent which had been used without permission of the owner by an officer of the United States prior to the passage of that act."

It is respectfully submitted that the analogy fails. In the *Crozier* case, neither General Crozier nor the Government ever claimed to take title to the Fried. Krupp patent. They simply *used* it, temporarily, in furtherance of the business of the United States, viz., the manufacture of guns, just as the Indian Office *used* the Shoshones' Reservation temporarily in furtherance of the desire and duty to provide facilities for the Arapahoes. There was no attempt to take the title to the patent away from Fried. Krupp. The language of the opinion of this Court is clear. It quotes the Statute, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims." * * *

The opinion then continues:

> "The text of this statute leaves no room to doubt that it was adopted in contemplation of the contingency of the assertion by a patentee that rights secured to him by a patent had been invaded for the benefit of the United States by one of its officers; that is, that such officer, under the conditions stated, had infringed a patent."

At numerous other places in the opinion are clear indications that what this Court was considering was only

the *use* of the Fried. Krupp patent, and that the adoption by the United States of General Crozier's *use* was an adoption of such act when and as committed. In the instant case the United States has adopted the act of the Indian Office in *using* the Shoshone Treaty lands. But Congress went a step further and provided for permanently acquiring title thereto.

The Johnson and Pope cases in the Court of Claims, cited *supra* under VII, are clear as to the nature of the temporary use and occupancy of the Shoshone's Reservation up to the date of the Jurisdictional Act and this suit thereunder.

Assignment of Error IX.

Petitioner submits that just compensation includes such addition to the value of the property at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously. The *Phelps* and *Jacobs* cases, cited under Assignment VII, *supra,* are conclusive on this point. They are referred to in the foot notes to the recent case of:

United States v. Creek Nation, 295 U. S. 103.

"But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here."

The Court of Claims in its order of June 1, 1936 (R. 99), states:

> "If the court had been dealing with similar questions between private parties or between the Government and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

Indians are citizens of the United States, such citizenship having been conferred by the Act of Congress of June 2, 1924 (43 Stat. 253). See 4 Kappler, 1,165.

By the General Allotment Act of Feb. 8, 1887, Sec. 6 (24 Stat. 388), Congress declared that Indians so allotted shall become citizens of the United States and of the State in which they reside.

Indians and Indian tribes come within the protection of the Constitution. In *United States v. Creek Nation, supra,* this Court stated:

> "While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane v. Pueblo of Santa Rosa, 249 U. S. 110-13; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307-8."

See also *Cherokee Nation v. So. Kans. R. R. Co.,* 135 U. S. 641; *U. S. v. Mille Lac Band of Chippewa Indians,* 229 U. S. 498, holding that property of Indian tribes comes within the rule of just compensation.

It would appear that as guardian of the Indians, both as individuals and as tribes, the United States is more strictly obligated to act justly toward the Indians than in similar cases of whites against the Government where such guardianship does not exist. This thought is cogently expressed by the Supreme Court in *Choctaw Nation v. United States,* 119 U. S. 1:

> "The recognized relation between the parties to this controversy is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exercised by the strong over those to whom they owe care and protection. The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

The Court of Claims states (R. 78):

> "Moreover, the rules with reference to condemnation proceedings and the taking of private property for public use are not entirely applicable to cases such as the one at bar. The Indian Tribes were under the control, care, and protection of the United States and although they could not legally be deprived of any property secured to them by treaty, agreement or act of Congress, the legal title to lands embraced in reservations set apart for the absolute and undisturbed use and occupancy of Indians remained in the United States."

There is no logical reason to discriminate against Indian tribes as compared with private parties merely on the ground that the naked legal title resides in the United States. It is well known that such legal title was retained solely so that it should not pass into foreign hands. As said by the Supreme Court in *Leavenworth L. & Co. v. United States,* 92 U. S. 733,

> "As long ago as in Cherokee Nation vs. Georgia, 5 Peters 1, this court said that the Indians are acknowledged to have the unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, United States v. Cook, 19 Wall. 591, this right of occupancy has been said to be sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier. * * * This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere.* For all practical purposes, the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interfered with it, violated the guarantees under which they had lived since that date."

The cases of the Yankton Sioux Tribes of Indians in the Court of Claims and the Supreme Court of the United States are applicable to the situation here presented.

Yankton Sioux Tribe of Indians v. United States, 61 Ct. Cls. 40.

The Indians sought to recover for the value of the Pipestone Quarries, 648 acres of land in Minnesota, alleging their ownership and claiming that the Government had wrongfully taken the lands. The Court of Claims found that the quarries were and ever had been open to the Indians to procure pipestone; that they had been deprived of no rights, and dismissed the petition. The decision of the Court of Claims was reviewed by the Supreme Court on certiorari in:

Yankton Sioux Tribe of Indians v. United States, 272 U. S. 351.

The Supreme Court reversed the decision of the Court of Claims stating:

> "It is quite clear from all the surrounding circumstances that the Indians understood that by this provision there was granted to them full ownership of the tract; and their claim to that effect they have always persistently and stoutly maintained."

After the reversal the case was disposed of in the Court of Claims in *Yankton Sioux Tribe of Indians v. United States,* 65 Ct. Cls. 428. In the body of the opinion the court recites the history of the case, the previous decision in 61 Ct. Cls. 40, and the reversal of that decision by the Supreme Court, stating:

> "The judgment dismissing the petition was reversed by the United States Supreme Court, 272 U. S. 351, 359, that court holding 'That the United States has taken and holds possession of the entire quarry tract of 648 acres * * * and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.'"

The finding and decision state:

"Finding VIII. The market value of the Pipestone Reservation in February, 1891, taking into consideration its value for grazing and agricultural purposes, the value of its mineral rights, and its historical value was $100,000.

"The Court decided that plaintiffs were entitled to recover as just compensation for the taking of the Pipestone Reservation $100,000 with interest from March 1, 1891, until paid."

———o———

CONCLUSION

It is submitted that the foregoing facts and authorities establish that:

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation.

2. The compensation allowed for the temporary use and occupation is inadequate.

3. The permanent taking occurred in 1927; and

4. Such amounts must be added to the value of the use and to the value of the undivided half interest as will produce the present full equivalent paid contemporaneously.

Finally, let it be remembered, the Shoshones have ever been loyal and friendly to their Government and its citizens (Finding 4, R. 36-37).

"Their attitude toward the Government and its officers was always one of fullest cooperation and

they always faithfully fulfilled their agreements and promises * * * he (Chief Washakie) and the members of his tribe implicitly trusted the Government not to overreach them * * * have been at peace with the whites since they first encountered Lewis & Clarke in 1805 * * * Washakie took a large war party of the Shoshones across Big Horn Mountain as an ally of the United States to assist General Crook in his campaign against the Sioux on the Rosebud in 1876, and at other times furnished soldiers to aid the United States Army in its wars with Indians such as the Sioux, the Arapahoes and the Cheyennes. * * * In many instances the Shoshone Indians furnished aid and comfort to the white emigrants passing through their country on the Oregon Trail and assisted in protecting the whites from hostile Indians."

It is this simple, friendly, faithful people who now ask only for just compensation. Many of the wrongs they have suffered can never be redressed. Their diversified farm home has been broken up and they have been crowded back to the uplands, to the lighter soil and the boulders, while the Arapahoe intruders enjoy the fertile lower river valleys. They have had an alien enemy quartered on their lands, with all the attendant dread of savage methods of Indian warfare. Such elements of damage are not compensable in this case yet when, after all of these years, justice is meted out to the Shoshones it is submitted that it should be measured with no niggardly and reluctant hand. Let it be that just compensation which should flow from a rich and powerful nation dealing with

a weak, untutored but trusting and every loyal friend. Let it be, as said by this court in *Choctaw Nation,* supra, "that superior justice which looks only to the substance of the right."

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

By GEORGE M. TUNISON,
Counsel for Petitioner.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

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No. 328

—o—

Supreme Court of the United States

—o—

OCTOBER TERM, 1936

—o—

THE UNITED STATES,

Petitioner,

vs.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

—o—

ANSWER TO CROSS-PETITION OF THE UNITED STATES IN CASE No. 328

—o—

Petitioner has not been favored with the Government's brief on its cross-petition in Case No. 328, *United States v. Shoshone Tribe.* We feel however that we understand the Government's position as stated in its cross-petition and deem it proper, since the cross-appeals are to be argued together, to here make answer. The Government's contentions, as stated in its Specification of Errors (cross-petition p. 9), are that the court below erred:

1. In holding that there was a "taking" by the Government of an undivided one-half interest in the Shoshone reservation for the benefit of the Arapahoes when the Commissioner of Indian Affairs on August 13, 1891, advised the Woodruff Commission that the Arapahoes had equal rights in the reservation which did not depend upon further consent of the Shoshones.
2. In not holding that the "taking" occurred in 1878 when the Arapahoes were removed by the Govern-

ment to the Shoshone reservation without the consent of the Shoshones and thereafter maintained there over the continued objection and protest of the Shoshones.

3. In holding that the Act of March 3, 1883, granted the Shoshones an interest in and to the reservation in addition to those interests which were granted by the Treaty of 1868.

STATEMENT

It is deemed necessary to call attention to a material inaccuracy appearing in the Statement in the Government's cross-petition, relating to the circumstances under which the Arapahoes came to the Shoshone reservation, p. 4, viz.:

> "Irwin was authorized and directed to proceed at once to the Shoshone Reservation and consult with the Indians there, with the intent of gaining their consent to the placing thereon of the Northern Arapahoes (hereafter called the Arapahoes), both tribes to be under one agent, and with instructions to represent to them the advantage of having a friendly neighboring tribe associated with them, and to present such arguments as would obtain their ready consent to the proposed arrangement (R. 44). Agent Irwin proceeded to the Shoshone Reservation (R. 44), and, after a council *upon the subject* with them and their chief, sent a telegram to the Commissioner of Indian Affairs at Washington, dated Cheyenne, Wyoming, October 17, 1877, as follows (R. 44-45) (italics ours):
>
> > "'I returned from Shoshone Agency today. Held council and made peace between Shoshones and Arapahoes.'"

The facts are that Agent Irwin did not present to the Shoshones, directly or indirectly, the *subject* of placing the Arapahoes upon the Shoshone reservation. The facts

found by the Court are directly contrary to the above statement in the Government's Cross-Petition.

> "Agent Irwin discussed with Chief Washakie and the Shoshones the matter of the contemplated removal of the Northern Arapahoe Band of Indians from their then location, but distinctly told Chief Washakie and the Shoshones that the President had no intention of placing the Arapahoes on the reservation of the Shoshones, and that this was not the design of the Government * * * the Government did not intend to place the Arapahoes directly on the Shoshone reservation. * * * Agent Irwin did not ask the Shoshones to express their willingness to admit the * * * Arapahoe * * * Indians amongst them * * * either temporarily or permanently, and the Shoshone Tribe of Indians did not at that time, or at any time thereafter express their willingness or give their consent to admit the Arapahoe Indians among them as permanent occupants" (Finding 10, R. 44-45).

—o—

ARGUMENT

We will consider the Government's three specifications, stated in its cross-petition, in their order:

I.

With respect to the first of defendant's contentions, viz., that the court below erred in holding that there was a taking of title in 1891, the parties hereto are in agreement. This is one of the rare instances where on review both sides allege the same error and both sides are right. In support of its contention that there was no taking in 1891 petitioner has fully and comprehensively presented its views of the facts and law in its original brief, *ante,* and it would only burden the record and the court to repeat same.

II.

Defendant's second contention is that the taking of title occurred in 1878. The law respecting the authority and power of administrative officials such as the Commissioner of Indian Affairs to take Indian titles has been fully presented in petitioner's original brief, *ante,* in the discussion of the alleged 1891 taking. That same law is applicable to the 1878 taking now claimed by the defendant and need not be here repeated. There remains to discuss the facts of the alleged taking in 1878.

The findings and opinion of the court below are clear and unambiguous. The Arapahoes were allies of the Sioux and Cheyennes and were ancient enemies of the Shoshones (Finding 8, R. 42-43). The Arapahoes would not remain on their own reservation, provided for them by treaty and repeated efforts during the period 1851 to 1878 to place them in settled homes were without success (Finding 8, R. 43). The facts of the Arapahoes coming to the Shoshone reservation are found by the court in Finding 10, as follows:

> "About October 1, 1877, a delegation of the Sioux and Arapahoe Indians visited Washington and called upon the Commissioner of Indian Affairs and the President, and the matter of their location upon some reservation was discussed. James Irwin, who had previously been agent for the Shoshones, but who was then the Indian agent at the Red Cloud Agency, which then had supervision over the Northern Arapahoe Band of Indians, was present. He had been instructed on September 12, 1877, to come to Washington with this delegation and to bring his interpreter. October 4, 1877, the Commissioner of Indian Affairs requested the Secretary of the Interior that 'Dr. James Irwin, Indian Agent at Red

Cloud Agency, be authorized to proceed to the Shoshone Reservation in Wyoming and consult with the Indians there, with the intent to gain their consent to permit the Arapahoes (now at Red Cloud Agency) to remove to their (the Shoshone) reservation, both tribes to be under the control of one agent.' The requested authority was given, and on the same day the Commissioner of Indian Affairs wrote Irwin at the Grand Central Hotel, New York, to 'proceed at once to the Shoshone Reservation to consult with the Indians there, with the intent to gain their consent to the removal of the Arapahoes thither, both tribes to be under the care of one agent. You will represent to them the advantage of having a neighboring friendly tribe associated with them, and from your large experience with the Shoshones will be able to present such arguments as will obtain their ready consent to the proposed arrangement.'' James Irwin had been an Indian agent for a considerable time prior to this date and was well acquainted with and highly respected by many Indian tribes, including the Shoshones. He had previously been agent for several years for the Shoshones on the Wind River Reservation.

"Irwin proceeded to the Shoshone Reservation, of which James I. Patten was then in charge as Indian agent. Agent Irwin held a council with Chief Washakie and the Shoshone Indians. * * * Agent Irwin discussed with Chief Washakie and the Shoshones the matter of the contemplated removal of the Northern Arapahoe Band of Indians from their then location, but distinctly told Chief Washakie and the Shoshones that the President had no intention of placing the Arapahoes on the reservation of the Shoshones, and that this was not the design of the Government; that all that was desired was that the Shoshones make peace with the Northern Arapahoe Tribe of Indians and that the Department would have a piece of land near the mouth of the Sweetwater, near the eastern boundary line of the Sho-

shone Reservation, set apart for the Arapahoes; that although the agent of the Shoshones would be agent of the Arapahoes also, yet the Government did not intend to place the Arapahoes directly on the Shoshone Reservation. This, as stated by Irwin at the time, was in accordance with the promise of the President to the delegation of Northern Arapahoe Indians on their visit to Washington in October 1877. In these circumstances Chief Washakie and the Shoshones agreed to make peace with the Arapahoes and informed Agent Irwin that they had nothing to say against their agent being over the Arapahoe Tribe also, but that they wanted the Arapahoes placed on a reservation apart from the Shoshones, giving as their reason therefor that the reservation, as at that time, was none too large for the use of the Shoshones, and, furthermore, that the Shoshones were afraid that the two tribes would not agree well together—that the Arapahoes would probably ill-behave themselves and bring trouble upon the Shoshones. At the same time, Irwin informed Agent Patten, of the Shoshone Reservation, that "the President promised the Arapahoes a reservation at the Red Buttes, including the mouth of the Sweetwater, and that is what the Arapahoes wanted, and that the agent of the Shoshones should be their agent, and that is * * * all the President will ask to have done." Agent Irwin did not ask the Shoshones to express their willingness to admit the Band of Northern Arapahoe and Cheyenne Indians amongst them upon their reservation or to consent to the placing of the Indians upon the Shoshone Reservation, either temporarily or permanently, and the Shoshone Tribe of Indians did not at that time, or at any time thereafter, express their willingness or give their consent to admit the Arapahoe Indians amongst them as permanent occupants." * * * (Finding 10, R. 43-45).

"On February 21, 1878, Agent Patten again wrote the Commissioner of Indian Affairs, referring specifi-

cally to the council with the Shoshones held by James Irwin the preceding October, calling attention to the fact that at that council the Shoshones had not expressed their willingness to admit the Arapahoes amongst them nor consented thereto, and again asked for instructions concerning the matter, to which no reply was made. The Northern Band of Arapahoe Indians was then being brought from Fort Fetterman to the Shoshone Reservation under military escort. Some of them arrived there March 18, 1878, without any previous knowledge to the Shoshones of their coming." * * * (Finding 10, R. 47).

"On March 19, 1878, Chief Washakie and a number of Shoshones met the Arapahoe delegation at the agency with Black Coal, the main chief, and Sharp Nose, White Horse, Six Feathers, and Friday, the latter being able to speak English. After some discussion between the Shoshones and Arapahoes the latter explained to Chief Washakie that their horses and their traveling equipment were in very bad condition; that their horses needed food and rest; that the Arapahoes were without food, and many of their number were sick; whereupon the Shoshones, through Chief Washakie, remembering their council with Irwin and Patten the preceding October, informed the Arapahoe chiefs that they might remain there for only a brief visit, but that they would have to leave as soon as they had rested and fed their horses. The Arapahoes stated that they could not possibly return to the place they had come from and asked Washakie to grant them permission to remain there for a little longer period than for a brief visit, so that their horses could be fed and rested, and that they would then remove from the reservation. They explained to Washakie that many of the Arapahoes had no horses at all; that they understood that the Government was preparing a reservation for them near the mouth of the Sweetwater River, and that they would go to this place as soon as possible. Thereupon, Chief Washakie

> stated to the Arapahoe delegation that he would permit them to come upon the Shoshone Reservation and remain there for a short time to rest for awhile and feed their horses. At this meeting the matter of the settlement of the Arapahoes upon the Shoshone Reservation was not mentioned and Washakie and the Shoshones were not then, or thereafter, requested to admit the Arapahoes amongst them upon the Shoshone Reservation." * * * (Finding 10, R. 47-48).

When the Arapahoes failed to leave the reservation, after the brief resting period granted by the Shoshones, the Shoshones promptly began to protest to their agent Patten. (Finding 10, R. 48). Patten transmitted these protests to the Commissioner of Indian Affairs (Finding 10, R. 49).

> "No reply was made by the Interior Department to this and many other reports of the agent calling attention to the persistent claims of the Shoshones that the Arapahoes were wrongfully upon that reservation and no steps were taken by the Department towards obtaining the consent of the Shoshones to admit the Arapahoes amongst them or to place the Arapahoes elsewhere. No action was taken by any official of the United States or the Interior Department concerning the location of the Arapahoes until August, 1891, when the Commissioner of Indian Affairs definitely held that the Arapahoes had equal rights with the Shoshones on the Shoshone Reservation, as hereinafter mentioned.
>
> "After the Arapahoes had camped upon the reservation, fed their horses, and had been furnished food and supplies by the agency for several months, the Shoshone Tribe, through Chief Washakie, began to protest to the agent against their continued presence upon the Shoshone Reservation. Such protests were thereafter continued and were mentioned from time to time in the reports of the Indian agent to the Commissioner of Indian Affairs, but no action was

taken thereon. The Arapahoes remained on the Shoshone Reservation, used and occupied the same equally with the Shoshones, pastured their stock and engaged in farming thereon, and received the benefits of all facilities and services equally with the Shoshones" • • • (Finding 10 R. 49-50).

In the opinion the Court states:

"Prior to August, 1891, the whole matter of the presence of the Arapahoes on the Shoshone Reservation was in a state of uncertainty. The record shows that the Shoshones desired and believed that the Government would finally provide a separate reservation for the Arapahoes, as the Shoshones had been advised would be done, and the Arapahoes were uncertain as to their rights upon the reservation and as to what would ultimately be provided for them. As late as March 30, 1886, the Arapahoes petitioned the Commissioner of Indian Affairs through Thomas M. Jones, then Indian Agent for the Shoshone Reservation, with reference to the uncertainty of their tenure. On that date Jones advised the Commissioner of Indian Affairs that "I am requested by the leading men of the Arapahoe Indians to state that they feel extremely uneasy in regard to their future prospects in view of a proposed bill before Congress respecting Indian lands. They fear that as Washakie, the chief of the Shoshones (so far as they can learn), has never surrendered on behalf of his tribe any of the land rights, to them, but has simply given his consent to the Arapahoes living here, and in case of passage of such an act, the law will fix it that this land belongs solely to the Shoshones and hence that they will be left out on this reservation and also on the one they came from." The Department instructed Agent Jones to inform the Arapahoes that they would be taken care of • • • (Opin., R. 76).

The theory of the Government in the court below was that the Shoshones had consented, without consideration, to give away a half interest in their beautiful home to

their ancient enemies, the Arapahoes (Opin., R. 31). Now, abandoning that contention, the Government claims that the half interest was forcibly taken from the Shoshones in 1878. The difficulty with this contention is that the Shoshones knew nothing of any such claim. They were highly honorable people. They respected their pledged word and they believed the Government would respect its pledged word (Finding 4, R. 36-7). So we have the unusual situation of the Government now claiming that the half interest in the Shoshones' treaty reservation was taken from them in 1878 by the mere "thought" of the the Commissioner of Indian Affairs, which "thought" was not at that time, nor thereafter until 1891, even communicated or made known to the Shoshones. The mere statement of such a proposition is startling yet it appears in the Government's Cross-Petition herein at pages 10-11, as follows:

> "The findings and opinion of the Court of Claims show that the Arapahoes were placed by the Government on the Shoshone reservation in 1878 without the consent of the Shoshones (except for a brief temporary period), and were thereafter continually kept there over the objection and protest of the Shoshones. The fact that the Arapahoes were removed to the Shoshone reservation upon the mistaken assumption that the consent of the Shoshones had been obtained or the fact that the Indians may have understood that provision would later be made for a separate reservation for the Arapahoes (R. 76) does not alter the situation that there is nothing in the findings or the opinion below from which the conclusion can be deduced that the Arapahoes were placed on the Shoshone reservation for any mere temporary purpose. Those in charge of Indian Affairs *thought* they had the consent of the Shoshones to the removal of the Arapahoes for permanent set-

> tlement and they thereafter continually kept the Arapahoes upon the reservation despite the repeated objections and protest of the Shoshones (italics ours).
>
> "The so-called ruling of the Commissioner of Indian Affairs of August 13, 1891, which the court below held constituted the taking, did not alter what had became a *fait accompli.*"

This Court has recently held in *United States v. Creek Nation,* 295 U. S. 103, that Indian treaty lands may not be taken by mistakes of officials of the Interior Department:

> "Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error."

It is further contended by the Government that Congress recognized the permanent location of the Arapahoes on the Shoshone reservation, prior to 1891, by making appropriations "for the Northern Cheyennes and Arapahoes in Wyoming and on the Tongue River in Montana" (Cross-Petition, p. 12). None of the acts referred to are capable of the construction claimed and it would be a startling innovation in our jurisprudence to hold that property rights may be divested in such indirect manner.

Legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred. *U. S. vs. Nice,* 241 U. S. 591; *Leavenworth et al R.R. vs. U. S.,* 92 U. S. 733.

One complete answer to such contention is that the Government of the United States, at any time up to

the filing of this suit under the Jurisdictional Act, could have brought and sucessfully maintained a proper action as guardian of the Shoshones, to exclude and eject the Arapahoes from the Shoshone tribal lands. One of the very purposes of the Jurisdictional Act was to put an end to the uncertain tenure of the Arapahoes on the reservation.

The court below found with respect to the 1891 letter of the Commissioner of Indian Affairs that:

> "This is the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe Band of Indians upon the Shoshone Reservation. * * * " (Finding 11, R. 50).

The court further found:

> "No action, except the enactment of the Jurisdictional Act in this case, was ever taken by Congress with reference to the presence of the Arapahoe Indians upon the Shoshone Reservation * * *" (Finding 11, R. 51).

It is submitted that the foregoing findings preclude the claim that the Shoshones' title was taken in 1878 by what the Commissioner of Indian Affairs may, in his own secret mind, have "thought," or that Congress surreptitiously, by language hidden away in Indian appropriation acts, intended to and did take the Shoshone title.

III.

Defendant's third and final contention is that the court erred in holding that the Act of 1883 granted the Shoshones an interest in their reservation greater than that granted by the Treaty of 1868. Petitioner's position is that the Jurisdictional Act of 1927 was a basic act upon which all rights should be predicated and adjudicated.

It authorized judgment on the claims of the Shoshones arising under or growing out of the treaty of 1868 or any subsequent agreement or "any subsequent Act of Congress affecting said tribe." Hence, it is submitted that the rights of the Shoshones, in bringing this suit under the Act of 1927, are to be adjudicated in accordance with the provisions of the 1868 treaty, the subsequent agreements of 1896 and 1904 and any Acts of Congress up to 1927.

BENEFICIAL OWNERSHIP OF NATURAL RESOURCES ON SHOSHONE RESERVATION IN TRIBE

Among the early recognitions by Congress of the beneficial ownership by Indian tribes of the natural resources of their treaty reservations and of the fact that such lands belong to them in their entirety is the act of February 6, 1871 (16 Stat. 404), which provided in Sec. 1 that two townships set apart for the Stockbridge and Munsee Indians of the State of Wisconsin shall be appraised, and that such appraisal shall state the quality of the soil, quantity, quality, and value of the timber, which shall be sold at the appraisal price by the Secretary of the Interior; and in Sec. 4, provided that the gross amount of money realized, after deducting therefrom certain moneys appropriated by the act, shall be paid to and expended for the benefit of the Indians.

Congress by the act of April 25, 1876 (19 Stat. 37), authorized the Secretary of the Interior to sell certain pine lands on the Menominee reservation and by Sec. 2 provided that the proceeds arising from all sales of such timber, after deducting certain expenses incident to the cutting and sale of said timber, shall be placed to the

credit of the United States for the benefit of said Menominee Indians.

The act of June 15, 1880 (21 Stat. 199), in Sec. 3, provided for the sale of lands belonging to the Ute Indians of Colorado, whether mineral or otherwise, in accordance with existing law and the proceeds of sale shall, after reimbursing the United States for all sums set apart or paid out by the act, be deposited as now provided by law for the benefit of said Indians. Similar acts were passed covering the Green Bay Reservation, March 31, 1882 (22 Stat. 36), and the Crow Reservation, April 11, 1882 (22 Stat. 42).

Act of March 3, 1883

Congress next passed the act of March 3, 1883 (22 Stat. 582-590), covering all Indian reservations, and reading as follows:

> "Sec. 2, * * * The proceeds of all pasturage and sales of timber, coal, or other products of any Indian reservation, except those of the Five Civilized Tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session."

Supplementing the act of 1883, Congress on March 2, 1887 (24 Stat. 449-463), enacted:

> "That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March 3, 1883, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose

account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress."

Since the above cited acts were passed the general and constant policy of Congress up to the present time has been to recognize that in addition to the right of use and occupancy of Indian treaty reservations, the Indians had complete equitable property not only in the surface but in all resources of every nature and in every element of value in such reservations under and above the surface. Such recognition is indicated by both general and special legislation bearing on the subject. For the information of the Court a list of such legislation is printed in Appendix "A" hereto, pp. 75, 76.

In addition to the general laws pertaining to the sale or lease of natural resources on Indian reservations for the benefit of the Indians and which apply equally to the Shoshones cited in the appended list, attention is called to the special legislation pertaining to the Shoshone Indians of the Wind River Reservation in Wyoming, as follows:

Act of March 3, 1905, 33 Stat. 1016.

"Art. 2. In consideration of the lands ceded, granted, relinquished and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the homestead, townsite, coal, and mineral land laws, or by sale for cash * * * that lands entered under the townsite, coal and mineral land laws shall be paid for in an amount and manner as provided by said laws * * * and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, the

amount so realized to be paid to and expended for said Indians in the manner hereinafter provided.

* * * * *

"Art IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or guarantee to find purchasers for said lands or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided."

By the act of February 25, 1909 (35 Stat. 650), the act of March 3, 1905, was amended so as to give locators of mineral lands on the ceded portion of the reservation five years instead of three years within which to make entry and payment.

By the act of August 21, 1916 (39 Stat. 516) it was provided:

"That the Secretary of the Interior is hereby authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian Reservation in the State of Wyoming under such terms and conditions as shall be by him prescribed; and the proceeds or royalties arising from any such leases shall first be applied to the extinguishment of any indebtedness of the Shoshone Indian tribe to the United States and thereafter shall be applied to the use and benefit of said tribe in the same manner as though secured from the sale of said lands as provided by the act of Congress approved March 3, 1905. * * * (See Act of March 27, 1928, 45 Stat. 371-2 on same subject).

Incidentally, it will be noted that in the foregoing act, as late as 1916, Congress provided that the proceeds from the oil and gas leases on the Shoshone reservation should be applied to extinguish indebtedness of the "Shoshone Tribe." Congress made no mention of the Arapahoes.

By the act of May 21, 1928 (45 Stat. 617), Congress authorized the allotment of lands on the diminished Shoshone or Wind River Reservation, Wyoming, classified as non-irrigable, non-timbered grazing lands, to unalloted children, and then provided:

> "That all minerals including oil and gas, on any of the lands allotted hereunder are reserved in common for the benefit of the Indians having rights on the reservation, and may be leased for mining purposes under existing law."

The record in this case shows that the Shoshone treaty and the agreements, as understood by the Shoshone Indians, as represented to them by treaty commissioners, as recognized and accepted by the Government throughout all of its transactions, the acts of the officers of the United States and the Acts of Congress itself, when fairly interpreted vest in the Shoshone Indians every right and title to their treaty reservation except the bare naked fee title held in trust for them by the United States.

The legislative history of Congress respecting the Indians indicates that the United States never intended and does not intend to profit from any resources on Indian reservations, and that the holding of the mere naked title was solely for the protection of the interests of the Indians during their pupilage.

Under the Shoshone treaty of 1868 the use and occupation of the lands in the reservation in their entirety were retained in the Shoshone Tribe forever, except when released in accordance with the terms of the treaty itself. This Court in Leavenworth R. R. Co. v. United States, 92 U. S. 733-742, said: "For all practical purposes, the Osages owned the lands; as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interfered with it violated the guarantees under which they had lived since that date." It would be doing violence, it is submitted, to reason and common sense to say that the wealth above and underlying the surface of the reservation lands should remain dormant forever. The treaty prohibits any one coming on the reservation except certain persons named who, in the nature of things, would not be permitted to go there for mining purposes.

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ATTORNEYS GENERAL'S OPINIONS

The progressive policy of Congress in its legislation passed session after session since 1871 establishes that the natural resources embraced within Indian reservations beneficially belong to the respective Indian tribes notwithstanding the naked legal title is in the United States. That the trend of legislative acts recognizes such right and ownership in the Indian tribes is interestingly set forth in the opinion of Acting Attorney General

Knaebel, dated Sept. 5, 1911, and reported in 29 Opp. Atty. Gen., pages 239-242, in relation to the lands of the White Mountain Apache Indian reservation. In this opinion Acting Attorney General Knaebel says:

"To be 'Indian country' it is not essential that a given area should be within an Indian reservation (ibid); it is of importance, however, to note that in the view of the Supreme Court, as expressed in Wilson's case, the reservation was a valid reservation—recognized indeed by Congress itself—of land subject to the Indian title. It was from the beginning, or had grown to be, something more than a mere refuge for the tribes collected there; the Indians were interested in the land. And this conception of an interest, not assertable, if you please, against the Government, but still an interest recognized by Congress as extending throughout the *entire* reservation (General Allotment Act of Feb. 8, 1887, 24 Stat. 388, Sec. 1, Sec. 5, third proviso), is confirmed and strengthened by subsequent acts of Congress, relating to this reservation exclusively.

"Thus by the act of February 20, 1893 (27 Stat. 469) it was provided that the money proceeds (over fees and survey expenses) to accrue from the sale of the lands which it took from the reservation and restored to the public domain should be held in trust 'for the sole use and benefit of the tribes of Indians now located upon said reservation,' and be expended for the best interests of those tribes. While this act, according to the declaration of the fifth section, was not to be construed as recognizing 'title or ownership' in the Indians, it contained no denial of their interest in the lands, but provided, as we have seen, a way for compensation for the land of which it deprived them.

"By the Indian Appropriation Act of March 2, 1895, the Secretary of the Interior was authorized to negotiate with the Indians of this reservation 'for the cession or relinquishment to the United

States of the lands embracing the coal fields,' it being provided that any agreement made should be submitted to Congress for its action (28 Stat. 894). An agreement was made and submitted and received the approval of Congress (Act June 10, 1898, 29 Stat. 358 et seq.). The agreement is set forth in the statute. It contains four articles. By Article I the Indians, that is, the Apache, Mohave, and Yuma Indians residing on the reservation, cede, grant and relinquish to the United States all their right, title and claim to a certain described portion of the reservation. By Article II the United States in consideration of the cession agrees;

"To place in the Treasury of the United States to the credit and for the sole benefit of the said Apache, Mohave and Yuma Indians and to account therefor annually, to them through their agent, the net proceeds accruing from the disposal of such coal and mineral lands, lying within the ceded territory, under the laws applicable thereto; and that said money shall be paid to them in cash from time to time as the same shall become available, pro rata, share and share alike to each man, woman and child of the tribes now living upon and entitled to the privileges of the said reservation.

"Article III provides for a survey, 'for the purpose of segregating the ceded land from the diminished reservation,' and that the cost shall be paid from the proceeds of the ceded lands.

"A later enactment restored another small tract of this reservation to the public domain, for sale under the mining laws. Although the area was but 231 acres, Congress nevertheless provided that the proceeds of sale, after deducting the expenses, should be held in trust for the tribes of Indians on the reservation, to be expended by the Commissioner of Indian Affairs under the direction and control of the Secretary of the Interior, for the best interests of those tribes (Act of March 2, 1901, 31 Stat. 952).

"From the character of the legislation as passed in review, there can be little doubt that in the mind and policy of Congress this reservation was not only a valid reservation set apart for the occupancy and enjoyment of the various tribes which have inhabited it from the beginning, and subject to be allotted in part to the individual members composing them, but was to be devoted to them in its *entirety* in such a sense that no part of it should be taken from them without their consent or giving something in return by way of compensation. And, of course, no distinction here is to be taken between the land and the timber growing upon it and, presumably, constituting its chief value (U. S. v. Cook, 19 Wall. 591).

"The act of June 25, 1910 (36 Stat. 955, Sec. 7) passed since the proclamation was issued, still further and more definitely extends and declares the same policy as to all such reservations in general. It provides:

"That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: Provided, That this section shall not apply to the States of Minnesota and Wisconsin."

* * * * *

A more recent and a cogently argued opinion of the Attorney General with regard to ownership of the resources on Indian reservations being in the respective Indian tribes is that of Mr. Attorney General Stone, dated May 27, 1924, and reported in 34 Opp. Atty. Gen., page 181. The following is quoted from said Opinion, page 189:

If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from

descriptive terms, there might be some question whether the right of "occupancy and use" included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge. As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time. Thus the treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course, that minerals and all other hidden or latent resources would go with the fee. The same is true of the general allotment act of 1887, which applies expressly to Executive order reservations, as well as to others. Then, beginning many years ago, many special acts were passed—with or without previous agreements with the Indians concerned—whereby surplus lands remaining to the tribe after completion of the allotments were to be sold for their benefit. In all these instances Congress has recognized the right of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the Government in surveying and selling the land. Legislation and treaties of this character were dealt with in Frost v. Wente (157 U. S., 46-50); Minnesota v. Hitchcock (185 U. S. 373); Lone Wolf v. Hitchcock (187 U. S. 553); United States v. Blendaur (128 Fed. 910, 913); Ash Sheep Co. v. United States (252 U. S. 159).

Similar provisions have been made in many other cases for the sale of surplus tribal lands, all the proceeds of all elements of value to go to the tribe. In a recent act for further allotment of the Crow Indian lands (41 Stat. 751), the minerals are reserved to the tribe instead of passing to the allottees (Sec. 6); and moreover, unallotted lands chiefly

valuable for the development of water power are reserved from allotment "for the benefit of the Crow Tribe of Indians" (Sec. 10). The Federal Water Power Act of June 10, 1920 (41 Stat. 1083) applies to tribal lands in Indian reservations of all kinds, but it provides (Sec. 17) that "all proceeds from any Indian reservation shall be placed to the credit of the Indians," etc.

Again, by a provision of the Indian appropriation act of June 30, 1919, the Secretary of the Interior was authorized to lease for the purpose "of mining for deposits of gold, silver, copper and other Metalliferous minerals," any part of the unallotted lands within "any Indian reservation" within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming heretofore withdrawn from entry under the mining laws. These states contain numerous Executive order reservations, and yet the act declares that all the royalties accruing from such leases shall be paid to the United States "for the benefit of the Indians" (41 Stat. 3, 31, 33). * * *

In respect to legislation and treaties of this character two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden or latent resources, merely gives them its own property as an act of grace. Second, that the Indian possessions extended to all elements of value in or connected with their lands, and the Government in securing those values to the Indians recognizes and confirms their preexisting right. If it were necessary here to decide as between these opposing views I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent (Lone Wolf v.

Hitchcock, 187 U. S., 554). Moreover, support for this view is found in many expressions of the courts. Thus, in the case just cited, the court quotes from Beecher v. Wetherby (95 U. S., 517, 525) as follows:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would only take the naked fee and could not disturb the Indians; that occupancy could only be interfered with or determined by the United States."

If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain. In Worcester v. Georgia (6 Pet. 515, 543, 544) Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right, as against each other, which he defines as "the exclusive right of purchasing such lands as the natives were willing to sell." As late as 1872 the Supreme Court said:

"Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land to any other governments or their subjects (Holden v. Joy, 17 Wall. 211, 244." * * *

The opinion cited by the Government, reported in 19 Opp. Atty. Gen., page 194, was rendered November 20, 1888, since which time Congress has by numerous acts recognized the rights of the Indians to the natural resources on their reservations. Furthermore, the 1888 opinion was overruled by the opinions of 1911 and 1924 above quoted.

This Court has held in Mitchel vs. United States, 9 Pet. 756, and in same case reported in 15 Pet. 84, that the

right of the Indians in their lands is not that of mere occupancy and perpetual possession, but a right of property, held under the guaranty of treaties.

Reverting to the Act of March 3, 1883, it is submitted that the Indian tribes or nations holding their reservations by treaty own the surface and everything above and below the surface, including all elements of value, but they cannot dispose of any part thereof without the consent of the United States, due to the naked title being in the United States. If a member of the tribes were permitted to sell or lease timber, mineral rights, pasturage, and other resources on the reservation lands held in common, he would have an undue advantage over the other Indians. The method adopted by the United States of granting the proceeds from such natural resources to the tribe as a whole permitted a just and equal distribution of the proceeds derived from such resources among the members of the tribe entitled thereto.

While said act of 1883 did not, in so many words, grant to the Indian tribes the right to remove the timber, minerals and other resources of value (the removal being a mere administrative matter lodged with the guardian), nevertheless it did what in effect amounts to the same thing—confirm to the Indian tribes all proceeds arising from the disposal of such resources embraced within the reservation lands. Possessing the reservation lands and all resources thereon prior to the passage of the act of 1883 so long as they existed as a tribe or nation of Indians, Congress by said act of 1883 recognized in effect, if not directly, their lawful right both to the land and the resources thereof, the United States re-

taining only the pre-emption right, as stated by Chief Justice Marshall, to purchase (6 Pet., 515).

Giving due regard to substance and not to mere form, in construing the act of 1883, supported as it is by subsequent legislation clearly showing the intent of Congress respecting the ownership of natural resources on Indian reservations, the conclusion expressed by Mr. Attorney General Stone that:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians,"

cannot be avoided.

When this suit was commenced pursuant to the Act of March 3, 1927, sales of timber and leases of mineral rights were recognized by law. The Government must respond in damages under the facts and law as they existed when this suit was instituted since the jurisdictional act provides that the judgment in the suit to be brought thereunder shall annul and cancel the Shoshone's titles.

The Court of Claims, in arriving at the value of the one-half interest in the Shoshone's reservation, committed no error in considering the beneficial ownership of the resources as a part of the value of the land itself. The Act of March 3, 1883, was in full force and effect during the period for which value was fixed, and the proceeds accruing to the Shoshones from sales and leases were as much a part of the lands as though the Indians held complete title to such lands. For all intents and purposes

there is no difference in this proceeding whether the tribe had a fee simple title, or whether the Government held the mere naked fee. All benefits during the period in question of a collateral nature arising from the land belonged to the Shoshone tribe; in other words, such benefits were attached to the land, and consequently during the period in question the land and the benefits were inseparable. Everything in the nature of value arising out of the land which the Shoshone Indians legally enjoyed should be considered as part of the land in estimating value.

Government's Authorities

Only two cases are cited by the Government in its petition for certiorari. Both are readily distinguishable.

The opinion in the Cook case, 19 Wall., 591, was rendered prior to the enactment of the act of March 3, 1883, and subsequent relative acts; furthermore, the treaty and the facts in that case are totally different from those in the instant case. There a small number of the tribe seeking personal profit cut and sold timber from the tribal land. Clearly this was unlawful.

In Pine River Logging & Improvement Co. v. United States, 186 U. S. 280, decided June 2, 1902, there is no citation or reference in the record, briefs or decisions to the act of March 3, 1883, consequently the courts did not pass upon the intent and effect of said act. Indeed the case is authority for the Shoshone's claim that the timber on the reservation is the property of the tribe as

a whole. Certain individual Indians had made contracts, under the Act of February 16, 1889, to log out and sell to the defendants, dead and down timber. The defendants took quantities far in excess of the contracts and were forced to account to the United States therefor. The court said:

> "In short, the object of these regulations (regulating sales under the act) was to prevent exactly what was done in this case, that is, the appropriation to a few Indians of the benefits of the act to the exclusion of the many."

CONCLUSION

It is submitted that the contentions made by the Government in its cross-petition have been fairly met and fully disposed of, and that the prayer of petitioner Shoshone Tribe for reversal of the judgment of the Court of Claims should be granted.

Due to facts and circumstances beyond control of counsel this case has been pending many years. In event the position of the Shoshones is sustained and the judgment of the Court of Claims reversed, it is respectfully requested that the reversal be accompanied by appropriate directions so that there may be an expeditious ending of the litigation. It is believed that the record in the court below contains ample evidence for findings of

value in accordance with petitioner's theory of the taking of use and the permanent taking of title.

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

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APPENDIX A.

General Acts of Congress in re Proceeds from Resources on Indian Reservations:

March 3, 1883, 22 Stat. 582, 590.
February 8, 1887, 24 Stat. 387, Sec. 5.
March 2, 1887, Ch. 320, 24 Stat. 449-463.
June 4, 1888, 25 Stat. 166.
February 16, 1889, 25 Stat. 673.
February 28, 1891, Sec. 3, 26 Stat. 744.
June 25, 1910, Sec. 7, 36 Stat. 855.
March 4, 1913, 37 Stat. 1015.
February 27, 1917, Secs. 1-4, 39 Stat. 944.
June 30, 1919, Sec. 26, 41 Stat. 3.
June 10, 1920, Sec. 17, 41 Stat., 1063.
May 29, 1924, 43 Stat. 244.
April 17, 1926, 44 Stat. 300.
July 3, 1926, 44 Stat. 890.
December 16, 1926, 44 Stat. 922.
March 3, 1927, 44 Stat. 1347.
June 18, 1934, Sec. 6, 48 Stat. 984-986.
June 28, 1934, Sec. 11, 48 Stat. 1268, 1273.

Special Acts of Congress in re Proceeds from Resources on Indian Reservations:

February 6, 1871, Secs. 1-4, 16 Stat. 404	Stockbridge-Munsee
February 19, 1875, Sec. 6, 18 Stat. 330	Seneca
April 25, 1876, 19 Stat. 37	Menominee
June 15, 1880, Sec. 3, 21 Stat. 199	Ute
March 31, 1882, 22 Stat. 36	Green Bay
April 11, 1882, Sec. 3, 22 Stat. 42	Crow
May 24, 1888, Sec. 2, 25 Stat. 157	Uintah
January 14, 1889, Sec. 7, 25 Stat. 642	Chippewa
March 2, 1889, Sec. 2, 25 Stat. 1013	Miami
June 12, 1890, 26 Stat. 146	Menominee
October 1, 1890, Secs. 3-4, 26 Stat. 658	Round Valley
June 17, 1892, 27 Stat. 52	Klamath
July 1, 1892, 27 Stat. 62	Colville
February 20, 1893, 27 Stat. 469	White Mountain Apache
February 20, 1895, 28 Stat. 677	Utes
June 10, 1896, Art. 2, 29 Stat. 358	White Mountain Apache
June 7, 1897, 30 Stat. 90	Chippewa
July 1, 1898, 30 Stat. 571	Colville
February 12, 1901, 31 Stat. 785	Grand Portage
February 28, 1901, 31 Stat. 819	New York Indians
March 2, 1901, 31 Stat. 952	White Mountain Apache
May 27, 1902, 32 Stat. 245	Uintah
June 27, 1902, 32 Stat. 440	Chippewa

April 23, 1904, 33 Stat. 302	Flathead
April 27, 1904, Arts. 2-3, Sec. 6, 33 Stat. 352	Crow
December 21, 1904, Secs. 3-4, 32 Stat. 595	Yakima
March 3, 1905, Art. 2, 33 Stat. 1016	Shoshone
March 3, 1905, 33 Stat. 1048	Uintah
March 22, 1906, Secs. 3-5-6, 34 Stat. 80	Colville
March 28, 1906, 34 Stat. 91	Jicarilla
June 21, 1906, 34 Stat. 325	Cour D'Alene
June 28, 1906, Para. 3, Sec. 3, 34 Stat. 539	Osage
June 28, 1906, 34 Stat. 547	Menominee
March 1, 1907, 34 Stat. 1015	Blackfeet
March 28, 1908, 35 Stat. 51	Menominee
May 23, 1908, Sec. 5; 35 Stat. 268	Chippewa
May 29, 1908, Sec. 5, 35 Stat. 458	Spokane
May 30, 1908, Secs. 7-15, 35 Stat. 558	Fort Peck
February 28, 1909, 35 Stat. 650	Shoshone
May 27, 1910, Secs. 4-7, 36 Stat. 440	Pine Ridge
May 30, 1910, Secs. 4-7, 36 Stat. 448	Rosebud
June 1, 1910, Secs. 7-10-11, 36 Stat. 455	Fort Berthold
August 1, 1914, Sec. 23, 38 Stat. 582	Bad River
August 3, 1914, 38 Stat. 641	Fort Berthold
May 18, 1916, 39 Stat. 123	Red Lake
August 21, 1916, 39 Stat. 519	Shoshone
February 25, 1920, 41 Stat. 452	Flathead
June 4, 1920, Sec. 6, 41 Stat. 451	Crows
March 3, 1921, Sec. 6, 41 Stat. 1355	Fort Belknap
September 20, 1922, 42 Stat. 857	Ft. Peck-Blackfeet
May 26, 1926, Sec. 6, 44 Stat. 658	Crows
March 3, 1927, 44 Stat. 1401	Fort Peck
May 21, 1928, 45 Stat. 617	Shoshone
February 21, 1931, 46 Stat. 1202	Papago

APPENDIX B.

Upon Motion for New Trial in the court below the following supplemental findings regarding value were requested by petitioner.

SUPPLEMENTAL FINDING I.

The fair and reasonable value of one-half undivided interest of the 2,040,010 acres unallotted Tribal Lands of the Shoshone or Wind River Reservation, in 1927, was $9,531,704.50 (Plaintiff's requested Finding XXXI, Brief pp. 524-5).

SUPPLEMENTAL FINDING II.

The fair and reasonable value of the lands on said Reservation allotted in severalty to the Arapahoes, the

dates when said allotments were made, and the number of acres allotted are as follows:

Years	Acres	Amounts
1907	93,787.12	$1,137,566.24
1915	10,579.34	58,249.59
Total	104,366.46	$1,195,815.83

The fair and reasonable value in 1927 of said 104,366.46 acres of land on said Reservation so allotted in severalty to said Arapahoes was $1,690,619.00 (Plaintiff's requested Finding XXX, Brief pp. 523-4).